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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)
) CC Docket No. 96-45
Federal-State Joint Board)
on Universal Service)

To: The Commission

PETITION FOR CLARIFICATION OF THE EDUCATION PARTIES

The American Council on Education^{1/}, American Association of Community
Colleges^{2/}, the American Association of State Colleges and Universities^{3/}, the Association of
American Universities^{4/}, the Association of College and University Telecommunications
Administrators^{5/}, MiCTA^{6/}, the National Association of State Universities and Land Grant

1/ The American Council on Education is the nation's umbrella higher education association, representing approximately 1,800 accredited, degree-granting colleges and universities from all sectors of higher education and other education and education-related organizations. Many of the ACE institutions are ITFS and/or public broadcast licensees.

2/ The American Association of Community Colleges is a national organization representing 1,064 presidents of the nation's regionally accredited, associate-degree granting colleges. Many of the member colleges of the association are ITFS, public TV and/or public radio licensees.

3/ The American Association of State Colleges and Universities is a higher education association of more than 400 public colleges and universities and systems across the United States, Puerto Rico, Guam, and the Virgin Islands.

4/ The Association of American Universities consists of 60 American universities and two Canadian universities. Approximately half of the members are public institutions.

5/ The Association of College and University Telecommunications Administrators is the professional association representing managers of voice, video, and data telecommunications on college and university campuses. ACUTA has over 800 college and university members, and 150 corporate members.

6/ MiCTA consists of 193 higher education institutions, 84 K-12 school districts, 11 nonprofit libraries, nine nonprofit health care providers, and 36 governmental agencies, located principally throughout the Midwest. MiCTA serves, in part, to identify and resolve common telecommunications issues and problems of its members.

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Colleges^{7/}, and the National ITFS Association^{8/}, (collectively, the "Education Parties"), by their attorneys, hereby petition for confirmation and clarification of the scope of certain provisions of the Commission's *Report and Order* in the above-referenced proceeding.^{9/} As shown below, the activities of the Education Parties do not make them a "carrier" or "other provider" required to contribute to the universal service fund.

DISCUSSION

The Education Parties have been in the forefront in using various telecommunications technologies, from open broadcast to ITFS, from satellites to SCAs, for the delivery of education and training at all levels. Therefore, they fully endorse the extension of universal service support mechanisms to schools, libraries, and rural health care providers. In particular, they believe that the Commission's *Report and Order* will provide educators with the wherewithal to revitalize, enrich, and equalize educational opportunities for all students, regardless of location or economic situation. Accordingly, they concur with the determination of Congress and the Commission that telecommunications carriers should be required to make reasonable contributions from their end user revenues to support the universal service fund.

^{7/} The National Association of State Universities and Land Grant Colleges represents more than 190 of the largest public universities and land grant colleges.

^{8/} The National ITFS Association is a national organization of approximately 73 ITFS licensees, permittees, and applicants in 29 states and the District of Columbia who are using ITFS frequencies to provide educational services to students enrolled in for-credit courses in elementary, secondary, college, post-graduate and career training. Many of the Association's ITFS licensee members are schools and school districts.

^{9/} Federal-State Joint Board on Universal Service, *Report and Order*, CC Dkt. No. 96-45, FCC 97-157, rel. May 8, 1997 (the "*Report and Order*").

The Education Parties believe that the universal service provisions of the Communications Act of 1934, as amended, ("the Act") and the Commission's implementing regulations capture the end user revenues of certain commercial carriers and other providers that sell telecommunications services to the public. Thus, the Education Parties believe that neither the Act nor the regulations were intended to render educational institutions, particularly public and nonprofit institutions, "telecommunications carriers" or "other providers" for the purposes of the *Report and Order* and that they do not obligate the institutions to make contributions to the fund on revenue received from incidental telecommunications activities, such as the leasing of excess capacity on non-carrier facilities. As shown below, ITFS and broadcast licenses have specific obligations under the Commission's rules to exercise control over the use of their facilities that distinguish them from the types of service providers that are subject to contribution obligations. Moreover, it is inappropriate as a matter of public policy and inconsistent with Congressional intent to decrease the opportunities for educational institutions to obtain critical financial support. Even to the extent that the Commission concludes that noncommercial ITFS and broadcast licenses fall within the category of optional contributors, it should exercise its discretion to exclude them from the contribution requirement.

First, the excess capacity leasing activities of the Education Parties do not render them telecommunications carriers within the meaning of the Commission's universal service rules. Unlike a carrier, which has no control over or responsibility for, the content transmitted by its end users, the Commission's rules imposes responsibility on the Education Parties licensees for material transmitted by their lessees. This legal responsibility

fundamentally differentiates the leasing of excess capacity by the Education Parties from the provision of telecommunications services by a "carrier." Moreover, there is no rational distinction that would support the Commission's decision in paragraph 781 of the *Report and Order* to exempt interstate telecommunications service providers of open video system, cable leased access and direct broadcast satellite services from universal service contribution responsibility and not similarly exempt the leasing of excess ITFS and ancillary spectrum by the Education Parties.^{10/} Indeed, the public interest considerations are even more compelling in this case and demand a clearly stated exemption for the Education Parties. In fact, many educational and commercial broadcasters lease their SCAs at or below cost to radio reading services for the visually impaired. These licensees may find the economic burden of continuing to offer this public interest service opportunity too great if they are required to make a contribution to the fund based on the gross revenues realized from these leases.

At the same time, the Education Parties note that Commission's rules permit licensees of ITFS stations to lease excess capacity to wireless cable operators. The rules also permit public and commercial broadcast stations to lease their vertical blanking interval and the subcarrier channel (the "SCA"). As noted above, SCAs often are provided at or below cost to radio reading services for service for the visually impaired. Similarly, educational licensees of satellite uplink facilities, especially with the advent of digital compression, lease excess capacity to others. It has long been both congressional and Commission policy to

^{10/} *Report and Order*, ¶ 781. Paragraph 796 reiterates the Commission's decision to exempt cable leased access providers, open video system providers and direct broadcast satellite providers from the obligation to make universal service fund contributions. In addition, to the extent that the lease of excess capacity in this context requires an educational institution to contribute to the fund, it is not apparent how the Commission could distinguish many common arrangements of commercial broadcasters, such as the sale of air time or LMAs.

encourage educational licensees to lease excess capacity and/or ancillary spectrum to others to generate badly need funds to support the licensee's educational mission.^{11/} This opportunity to generate revenue has, in part, been permitted in recognition of the finite and limited federal appropriations available to support educational telecommunications. To require these licensees to contribute to the universal service fund on the basis of these revenues as a general matter conflicts with the public policy underlying this form of revenue generation.

Even if the Commission were to determine that lease of excess ITFS and ancillary broadcast capacity could be subject to the contribution requirement, it should exercise its discretion to exempt such services from that requirement. Section 254(d) of the Act gives the Commission discretion to require other telecommunications providers to contribute to the universal service fund, but only "*if the public interest so requires.*"^{12/} The Commission has chosen to exercise that discretion to require private carriers to contribute to the universal service funds. The Education Parties submit that the public interest clearly requires that the universal service contribution obligation not be extended to colleges and universities that provide telecommunications services to their students, or to colleges and universities, state networks, and schools and school districts that lease excess and ancillary spectrum.

The Commission has clear discretion here because excess capacity is leased on an individualized, case-by-case basis, not on a common carrier basis. In light of that discretion,

^{11/} See, e.g., The Public Broadcasting Amendments Act of 1981, HR Rep. 97-82, 97th Cong., 1st Sess. 6, 8, 13-14 (1981).

^{12/} 47 U.S.C. § 254(d) (emphasis supplied).

it defies reason to assume that Congress and the Commission intended in the *Report and Order* to require often cash strapped, publicly supported educational institutions to pay into the fund to the detriment of their educational activities, especially where many of these entities are the intended beneficiaries of universal service support. In addition, while the costs of contributions could be significant to educational institutions, those contributions would not constitute a significant portion of the overall universal service fund, so there would be little benefit to the public of imposing these costs on educational institutions. Consequently, it is evident that the Commission, to the extent it determines that lease of excess ITFS and broadcast capacity could be subject to a contribution requirement, should exercise its discretion to exempt these activities.

Finally, the Education Parties do not believe that it was the intention of either Congress or the Commission to require educational institutions to contribute to the universal service fund when they act as traffic aggregators for their institutions. Commission also should confirm the exercise of its discretion under Section 254 to exempt educational institutions from contribution requirements when they act as traffic aggregators, especially when they do so on a non-profit basis. Colleges and universities function as aggregators only for the very limited purpose of serving the telecommunications needs of their campus communities, not the general public. This activity is not provided as a commercial business activity. It clearly is ancillary to the critical central mission of colleges and universities: educating the Nation's youth, training and retraining of its workers, and conducting research and scholarship. As with the ancillary services described above, there is no public benefit that accrues from requiring educational institutions to make contributions, and the costs of

the administrative burdens on both the institutions and the fund administrator from requiring such contributions could well exceed the contributions that would be obtained. Moreover, the Education Parties note that if educational institutions' traffic aggregation were excluded from the contribution requirement, the fund could obtain nearly the same level of contributions from the underlying carriers. Thus, an exemption for these services also is justified in the public interest. It is for these reasons that the Educational Parties concluded that the traffic aggregation activities of educational institutions are not intended to be captured by the rules.

CONCLUSION

For the foregoing reasons, the Education Parties respectfully request that the Commission clarify the *Report and Order* as described herein^{13/}.

Respectfully submitted,

AMERICAN COUNCIL ON EDUCATION
AMERICAN ASSOCIATION OF COMMUNITY
COLLEGES
AMERICAN ASSOCIATION OF STATE
COLLEGES AND UNIVERSITIES
ASSOCIATION OF AMERICAN UNIVERSITIES
ASSOCIATION OF COLLEGE AND UNIVERSITY
TELECOMMUNICATIONS ADMINISTRATORS
MiCTA
NATIONAL ASSOCIATION OF STATE
UNIVERSITIES AND LAND GRANT COLLEGES

^{13/} The Education Parties believe that a significant number of the Nation's educational institutions have concluded that they are not required to contribute to the universal service fund on the basis of their incidental and/or ancillary telecommunications activities. Therefore, in the event that the Commission disagrees with their understanding of the Act and the Commission's implementing rules, the Education Parties request that these institutions be given additional time to develop the necessary data and to complete and file FCC Form 457.

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